MAR 14 2001

SPR-126683-00

MEMORANDUM FOR HEADQUARTERS PROGRAM MANAGER,
EXCISE TAX   S:C:CP:RC:EX

FROM: Chief, Branch 8   (signed) RUTH HOFFMAN
                     Associate Chief Counsel
                     (Passthroughs and Special Industries)   CC:PSI:8

SUBJECT: Fuel Sample - Chain of Custody Documents

This responds to your request that we review, for legal adequacy, two proposed chain of custody control documents: (1) Internal Revenue Service (IRS) Chain of Custody and Shipping Record form and (2) IRS Chain of Custody Control Document form relating to the fuel excise taxes imposed by § 4081 of the Code. The forms are designed to record each transfer of a fuel sample to and from and within IRS control. Both documents seem acceptable to us to record the chain of custody for each transfer of a fuel sample to and from and within IRS control.

Section 4081 imposes a tax on certain removals, entries (into the United States) and sales of taxable fuel, including diesel fuel and kerosene. Generally, diesel fuel and kerosene are exempt from tax only if they are dyed red in accordance with § 48.4082-1 of the Manufacturers and Retailers Excise Tax Regulations. Section 6715 imposes a penalty if dyed fuel is improperly sold or used. The IRS employs Fuel Compliance Officers (FCOs) to enforce these provisions. FCOs obtain physical samples of fuel to determine if the fuel is dyed red. Typically, this occurs at fuel terminals to determine whether the fuel is dyed in accordance with the regulations and at state highway weigh stations to determine if truckers are improperly using dyed fuel. The samples are then sent to a laboratory operated by the United States Air Force to verify the concentration of the dye, if any, in the fuel.

Rules relating to the chain of custody are found in Rule 901 of the Federal Rules of Evidence. Rule 901(a) states that "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Authentication or identification conforming with the requirements of Rule 901 is satisfied by the testimony of a witness with knowledge. Fed. R. Evid. 901(b)(1). The ultimate question is whether

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the authentication testimony was sufficiently complete so as to convince the court that it is improbable that the original item had been exchanged with another or otherwise tampered with. United States v. Howard-Arias, 679 F.2d 363, 366 (4th Cir. 1982). Precision in developing the chain of custody is not an iron-clad requirement, and the fact of a missing link does not prevent the admission of real evidence, so long as there is sufficient proof that the evidence is what it purports to be and has not been altered in any material aspect. Id.; see also United States v. Turpin, 65 F.3d 1207, 1213 (4th Cir. 1995) (stating that the government must establish through a chain of custody that the evidence is in substantially the same condition it was when it was seized).

A chain of custody should be established from the time of seizure of the item until the time it is brought into court. United States v. Keine, 424 F.2d 39, 40 (10th Cir. 1970). The government must make a prima facie showing that at the time of the chemical tests and the trial, the item tested and introduced in evidence was the same item, and in substantially the same condition, as those seized. United States v. Godoy, 528 F.2d 281, 283 (9th Cir. 1975); Gallego v. United States, 276 F.2d 914, 917 (9th Cir. 1960). However, gaps in the chain of custody affect only the weight of the evidence and not its admissibility. United States v. Levy, 904 F.2d 1026, 1030 (6th Cir. 1990), cert. denied, 498 U.S. 1091 (1991); United States v. Lopez, 758 F.2d 1517, 1521 (11th Cir. 1985), cert. denied, 474 U.S. 1054 (1986).

If you have any further questions on this matter, please contact Frank Boland at (202) 622-3130.